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8 **DONALD THORN**

9  
10 **UNITED STATES BANKRUPTCY COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SANTA ROSA DIVISION**

13 In re:

14 Case No.: 13-10923-AJ-7

15 Javier Agusto and Heidi Erica Alvarez

16 A.P. No.: 13-01103

17 Debtors./

18 Donald Thorn

19 **PLAINTIFF DONALD THORN'S REPLY  
20 TO DEFENDANTS' OPPOSITION TO HIS  
21 MOTION FOR SUMMARY JUDGMENT**

22 Plaintiff,

23 Date: April 4, 2014

24 v.

25 Time: 9:00 a.m.

26 Javier Agusto and Heidi Erica Alvarez

27 Place: 99 South E Street

28 Defendants./

29 Santa Rosa, California

30 A.P. Filed: August 6, 2013

31 Trial Date: September 17, 2014

32 **Judge: Alan Jaroslovsky**

33  
34 **I.**  
35 **INTRODUCTION**

36 Plaintiff Donald Thorn's motion for summary judgment in the adversary action focuses  
37 upon whether or not judicial estoppel applies to the June 8, 2012 judgment and the October 10,  
38 2012 amended judgment awarding attorney's fees in his favor and against defendants Javier  
39 Agusto Alvarez and Heidi Eric Alvarez under Civil Code § 3426.4 in Sonoma County Superior  
40 Court case number SCV-246852 to preclude dischargeability under 11 U.S.C. § (a)(6). The June  
41

1 8, 2012 judgment and the October 10, 2012 amended judgment as well as the notice of motion  
2 for attorney's fees under California Civil Code § 3426.4 and memorandum of points and  
3 authorities in support of such motion under California Civil Code § 3426.4 in Sonoma County  
4 Superior Court case number SCV-246852 is before this court. Under In re Lopez (2007) 367  
5 B.R. 99, Donald Thorn's award of \$30,000 in attorney's fees against Javier Agusto Alvarez and  
6 Heidi Erica Alvarez under Civil Code § 3426.4 as a matter of law precludes the Alvarez  
7 defendants' discharge of the October 10, 2012 amended judgment in the State Court action under  
8 11 U.S.C. § 523(a)(6).

9  
10 In conjunction with this reply to defendants' opposition to Donald Thorn's motion for  
11 summary judgment, he has submitted objections to the declaration of Byron T. Nelson and all  
12 exhibits thereto dated March 17, 2014, the March 16, 2014 declaration of Javier Agusto Alvarez  
13 and the declaration of Heidi Erica Alvarez. Plaintiff objects on the grounds that the declarations  
14 and the evidence they are attempting to introduce before this court is barred by judicial estoppel  
15 per the June 8, 2012 judgment and the October 10, 2012 amended judgment awarding attorney's  
16 fees in favor of plaintiff and against defendants Javier Agusto Alvarez and Heidi Erica Alvarez  
17 under California Civil Code § 3426.4 in Sonoma County Superior Court case number SCV-  
18 246852 under In re Lopez (2007) 367 B.R. 99.

19  
20 The evidence before this court as to the summary judgment motion which includes the  
21 notice of motion and the memorandum of points and authorities in support of Donald Thorn's  
22 request for attorney's fees against the Alvarez defendants in the underlying State Court action  
23 clearly shows that he sought attorney's fees under California Civil Code § 3426.4 and that the  
24 trial court granted Donald Thorn \$30,000 in attorney's fees under this code section. As a matter  
25 of law and under In re Lopez, *supra*, (as well as other cited authority in Donald Thorn's  
26  
27  
28

1 memorandum of points and authorities in support of this motion), plaintiff's judgment against the  
2 Alvarez defendants is not dischargeable under 11 U.S.C. § 523(a)(6).

3 Noteworthy is that defendants have cited no authority undermining the holding of In re  
4 Lopez, supra. Defendants' time to appeal the judgment against them in the State Court action  
5 has long passed.

6

7 **II.**  
8 **STATEMENT OF FACTS**

9 The only material facts this court should consider with respect to this motion for  
10 summary judgment was that Donald Thorn was awarded \$36,829.98 on June 22, 2012 in the  
11 Sonoma County Superior Court action against defendants Javier Agusto Alvarez and Heidi Erica  
12 Alvarez jointly and severally for breach of contract, conversion/interference with property (an  
13 intentional tort), negligence, common counts and injunctive relief with respect to Donald Thorn's  
14 assets (trade secrets).

15 The amended judgment in the Sonoma County Superior Court action entered on October  
16 10, 2012 awarded plaintiff Donald Thorn \$30,000 in attorney's fees against defendants Javier  
17 Agusto Alvarez and Heidi Erica Alvarez under California Civil Code § 3426 et seq. (California's  
18 Uniform Trade Secret's Act).

19 Plaintiff Donald Thorn's judgment and amended judgment in Sonoma County Superior  
20 Court case number SCV-246852 for conversion and violation of the Uniform Trade Secret's Act  
21 (Civil Code § 3426 et seq.) against the Alvarez defendants found that there was a finding of  
22 willful and intentional conduct where an award of attorney's fees under Civil Code § 3426.4 is  
23 not dischargeable under 11 U.S.C. § 523(a)(6).

24 The notice of motion for attorney's fees under Civil Code § 3426.6 and the memorandum  
25 of points and authorities in support of that motion also before this court with respect to this

1 motion for summary judgment supports the finding that Donald Thorn's judgment against the  
2 Alvarez defendants in the Sonoma County Superior Court action is not dischargeable as a matter  
3 of law under In re Lopez (2007) 367 B.R. 99 and 11 U.S.C. § 523(a)(6). As such, the statement  
4 of facts submitted by the Alvarez defendants at page 3, lines 20 through 28 and page 4, lines 1  
5 through 26 is not relevant to the issues before this court in that they are improperly attempting to  
6 re-litigate the underlying action in the Sonoma County Superior Court.  
7

8 **III.**

9 **PLAINTIFF DONALD THORN IS ENTITLED TO SUMMARY JUDGMENT AGAINST**  
10 **DEFENDANTS JAVIER AGUSTO ALVAREZ AND HEIDI ERICA ALVAREZ**

11 As a matter of law, plaintiff Donald Thorn is entitled to summary judgment against  
12 defendants Javier Agusto Alvarez and Heidi Erica Alvarez based upon the State Court's award of  
13 attorney's fees in Donald Thorn's favor and against the Alvarez defendants under California  
14 Civil Code § 3426.4. In attempting to create a triable issue of material facts, defendants seek to  
15 re-litigate the underlying judgment and the amended judgment in the Sonoma County Superior  
16 Court which were entered well before the Alvarez defendants filed for Chapter 7 bankruptcy  
17 protection.  
18

19 The seminal case supporting plaintiff Donald Thorn's position where the court should  
20 award him summary judgment in his favor against the Alvarez defendants finding that the  
21 judgment against them is not dischargeable under 11 U.S.C. § 523(a)(6) is In re Lopez, *supra*,  
22 where in awarding attorney's fees under Civil Code § 3426.4 (as we have with respect to Donald  
23 Thorn's matter), the United States Bankruptcy Panel held that the State Court necessarily had to  
24 find that the misappropriation of trade secrets by the defendant in In re Lopez was willful and  
25 malicious.  
26

27 It is irrelevant that this court to go beyond the judgment, amended judgment, the notice of  
28

1 motion for attorney's fees under Civil Code § 3426.4 and the memorandum of points and  
2 authorities in support of Donald Thorn's motion for attorney's fees under Civil Code § 3426.4  
3 where the Alvarez defendants herein seek to try the underlying case again.  
4

5 The key in this court's decision is whether or not the award of \$30,000 to Donald Thorn  
6 against the Alvarez defendants in the underlying State Court action under Civil Code § 3426.4  
7 mandated that the State Court necessarily had to find that the Alvarez defendants  
8 misappropriation of his trade secrets was willful and malicious. The answer is clearly in the  
9 affirmative under the law and authorities presented to this court by plaintiff Donald Thorn.  
10

11 It is irrelevant if the Thorn v. Alvarez dispute at the State Court level was fully litigated  
12 or not before a judge or jury or resolved by a dispositive motion. The key is that the Sonoma  
13 County Superior Court awarded Donald Thorn attorney's fees specifically under California Civil  
14 Code § 3426.4 for the intentional tort of conversion specifically stated in the judgment and  
15 amended judgment against the Alvarez defendants. Had it not, the \$30,000 in attorney's fees  
16 would not have been award. As such, under In re Lopez, supra, the State Court had to find that  
17 the Alvarez defendants' intentional torts of misappropriating Donald Thorn's trade secrets was  
18 willful and malicious and as such, the judgment Donald Thorn has against the Alvarez  
19 defendants in the Sonoma County Superior Court case number SCV-246852 is not dischargeable  
20 under 11 U.S.C. § 523(a)(6) as a matter of law.  
21  
22

23 The Alvarez defendants at length attempted to distinguish the In re Lopez decision yet  
24 failed to discuss where the United States Bankruptcy Panel referenced numerous reported cases  
25 granting summary judgments premised on identity of issues as appropriate under 11 U.S.C. §  
26 523(a)(6) where a debtor was found by a State Court as in this Sonoma County Superior Court  
27 action to have misappropriated trade secrets as follows:  
28

1. Hobson Mould Works, Inc. v. Madsen [In re Madsen (8<sup>th</sup> Cir. 1999)] 195 F.3d  
2 988;  
3  
4. 2. Kawaauhau v. Geiger (1998) 523 U.S. 57;  
5 3. Spring Works, Inc. v. Sarff (In re Sarff), 6<sup>th</sup> Cir. BAP 2000, 242 B.R. 620;  
6 4. Worldwide Prosthetic Supply, Inc. v. Mikulsky (In re Mikulsky), 301 B.R. 726  
7 (Bankr.E.D.Wis. 2003);  
8  
9 5. Read & Lundy, Inc. v. Brier (In re Brier), 274 B.R. 37 (Bankr.D.Mass.2002); and  
10 6. Dent Wizard Intel. Corp. v. Brown (In re Brown), 237 B.R. 740 Bankr.C.D.Cal.  
11 1999).

12 In fact, plaintiff Donald Thorn submitted authority to the court in his memorandum of  
13 points and authorities where summary judgment motions were denied as to a plaintiff for  
14 misappropriate of trade secrets as being non-dischargeable under 11 U.S.C. § 523(a)(6) which  
15 factually do not apply to the clear language of the judgment, amended judgment and the legal  
16 and factual basis Donald Thorn's motion for attorney's fees under Civil Code § 3426.4 as stated  
17 in his notice of motion and memorandum of points and authorities in support of this motion for  
18 attorney's fees in the Sonoma County Superior Court action.

20  
21 IV.  
22 CONCLUSION

23 It is undisputed through the judgment, amended judgment, the memorandum of points of  
24 points and authorities and the notice of motion for attorney's fees under Civil Code § 3426.4 that  
25 the Sonoma County Superior Court held that the Alvarez defendants converted property of  
26 Donald Thorn, an intentional tort by intentionally and purposefully taking his client list and  
27 awarded him attorney's fees under Civil Code § 3426.4.

28 ///

1           Under the holding of In re Lopez, supra, as well as other authority presented to the court,  
2 Donald Thorn's amended judgment against the Alvarez defendants is not dischargeable under 11  
3 U.S.C. § 523(a)(6) as a matter of law.  
4

5           For such reasons, plaintiff Donald Thorn's motion for summary judgment must be  
6 granted as a matter of law as to his adversary complaint against Javier Agusto Alvarez and Heidi  
7 Erica Alvarez.

8 Date: March 20, 2014

SUNDERLAND | McCUTCHAN, LLP



Edward McCutchan  
Attorneys for Plaintiff and Judgment Creditor  
DONALD THORN

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF SONOMA

3  
4 I am employed in the County of Sonoma, State of California. I am over the age of 18 and  
5 not a party to the within action; my present address is: 412 Aviation Boulevard, Suite D, Santa  
6 Rosa, California 95403.

7 On March 24, 2014, I served the foregoing document described as **PLAINTIFF**  
8 **DONALD THORN'S REPLY TO DEFENDANTS' OPPOSITION TO HIS MOTION FOR**  
9 **SUMMARY JUDGMENT** on the parties by placing a true copy thereof enclosed in a sealed  
10 envelope addressed as follows:

11 **SEE ATTACHED SERVICE LIST**

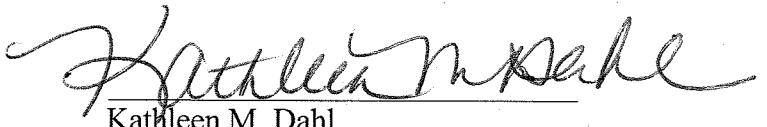
12 XX By Regular U.S. Mail. The documents were placed for collection and mailing following  
13 ordinary business practice for deposit in the United States Postal Service in a sealed envelope with  
14 postage thereon fully prepaid, addressed as stated above.

15 — By personal service. I caused each such envelope to be delivered by hand to the  
16 addressee(s) as stated above.

17 — By facsimile transmitted from (707) 284-5527. The document transmission was reported as  
18 complete and without error.

19 — By email or electronic transmission. I caused the document to be sent to the persons at the  
20 email addresses listed below. I did not receive within a reasonable time after the transmission any  
21 electronic message or other indication that the transmission was unsuccessful.

22  
23 I declare under penalty of perjury under the laws of the State of California that the foregoing  
24 is true and correct and that this declaration was executed on March 24, 2014, at Santa Rosa,  
25 California.

26  
27  
28   
Kathleen M. Dahl

In re: Javier Agusto Alvarez, Heidi Erica Alvarez  
United States Bankruptcy Court Case No.: 13-10923-AJ-7

Attorneys for Defendants/Debtors: Javier Agusto Alvarez and Heidi Erica Alvarez

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